THE SUPREME COURT

[Appeal No: 2014/309]

Clarke C.J.
Dunne J.
Finlay Geoghegan J.

In the matter of the Freedom of Information Acts 1997 and 2003

Between

The Minister for Health

Appellant / Respondent

and

The Information Commissioner

Respondent / Appellant

and

First Named Notice (By Order Unnamed)

and

The Honourable Thomas C. Smyth

Notice Parties

Draft Judgment of Ms. Justice Finlay Geoghegan delivered on the 27th day of May, 2019.

1. This appeal raises difficult questions in relation to the proper interpretation of the phrase "any record held by a public body" in s. 6(1) of the Freedom of Information Act 1997 ("the 1997 Act").

2. It is an appeal from an order of the High Court (O'Neill J.) made on 30 May 2014, for the reasons set out in a written judgment delivered on 9 May 2014: [2014] IEHC 231, [2014] 2 I.R. 673.

3. The proceedings in the High Court were an appeal brought by the Minister for Health ("the Minister"), pursuant to s. 42(1) of the 1997 Act, against a decision of the Information Commissioner ("the Commissioner") issued on 7 June 2013 which determined that a document sought by the first named notice party from the Department of Health ("the Department") was held by the Department within the meaning of s. 6(1) of the 1997 Act. The High Court decided that the document sought was not "a record held by" the Minister and set aside the decision of the Commissioner issued on 7 June 2013. The High Court also ordered that the first named notice party should not be named and there is no appeal against that part of the order.

Background Facts

4. The background facts are fully set out in the judgment of the High Court and may be summarised for the purposes of the issues arising on appeal as follows.

5. The Minister appointed the second notice party, the Honourable Thomas C. Smyth, a former judge of the High Court, whom I will refer to as "the Reviewer" to carry out a review in relation to certain matters at Our Lady of Lourdes Hospital, Drogheda. The terms of reference for the review provided that he was to "examine

and recommend to the Minister" whether further investigation into the procedures and practices operating at Our Lady of Lourdes Hospital, Drogheda, during the period 1964 to 1995, to protect patients from sexual abuse while undergoing treatment or care at the hospital and to deal with certain allegations of sexual abuse against a named surgeon would be likely to provide additional information or insights which would be of significant public benefit in helping to improve best practice guidelines and policies which apply to the treatment of patients in hospital for the purpose of protecting such patients from being sexually abused. The terms of reference also provided that the examination and recommendation should have regard to, *inter alia*, "the need to avoid prejudicing ongoing civil or criminal proceedings or investigations".

6. Prior to the formal appointment of the Reviewer, there was correspondence between him and the Department in relation to his prospective appointment and, in particular, the treatment of documents and records of the review or inquiry. A letter of 18 December 2009 from an assistant secretary of the Department to the Reviewer stated:-

> "We sought the advice of the Attorney General as you suggested and his Office has advised that it would be possible for the Enquiry to agree with persons or bodies to the terms in which documents would be supplied and if documents are given on a confidential basis and on condition that they will be returned or destroyed that is acceptable in my view but there should be a form of written agreement. The records of the Enquiry itself should be preserved in any event and could be used by any subsequent statutory tribunal which will have its own powers in relation to witnesses and documents.

7. The review, or "Enquiry" as referred to in the above, was not established on a statutory basis. During the course of the review, a number of individuals, including the first named notice party, were interviewed by the Reviewer and written transcripts prepared of such interviews.

8. The document sought by the first named notice party from the Department under the 1997 Act is the transcript of his meeting with the Reviewer.

9. Following the conclusion of the review, referred to as the "Drogheda Review", the Reviewer delivered to the Department a number of boxes of documents and records with an accompanying letter of 23 September 2010. In that letter, the Reviewer set out the basis upon which the boxes were being delivered to the Department placing differing restrictions in respect of certain of the boxes identified in the letter.

10. It is agreed that the document or record sought by the first named notice party is contained in one of a number of boxes stated to be "bound in clear masking tape" and to which the following stipulation was made by the Reviewer:-

> ". . . may not be disclosed or opened in any circumstances except by court Order for Discovery, of which I wish to be notified. These contain information received by me on the assurance given by me to each participant that their communications with the review would be treated as confidential. In the absence of such assurance I am satisfied that many individuals would not have participated in the Review." [Emphasis in original]

11. On 16 May 2012, the first named notice party made a request to the Department under the 1997 Act seeking a copy of the transcript of his meeting with

the Reviewer. This request was refused by the Department in a letter dated 15 June 2012 which, *inter alia*, stated that:-

> "The documents generated in the course of the Review were furnished to the Department by Judge Smyth in the strictest stipulations of confidentiality, and accordingly the Department considers itself bound by these stipulations. The Department is effectively a depository for these documents."

12. The first named notice party requested an internal review of this decision, which was carried out and which was communicated to the first named notice party by letter dated 2 July 2012. The determination stated:-

> "...The Department can only give access to records which it holds and which are under its control. The records created by the Drogheda Review have been sealed by Judge Smyth who placed them with the Department for safe-keeping. The Department has been advised that the records are not in the control of this Department and cannot be accessed or released by the Department under FOI legislation.
>
> In the circumstances, I must refuse your request on the basis that the records requested are not held by this Department. This decision takes into account the provision in Section 2(5)(a) of the FOI Act which states that 'a reference to records held by a public body includes a reference to records under the control of that body'.
>
> The Department has also been advised that the Drogheda Review is not a public body for the purposes of the FOI Act. This means that the Department cannot forward your request to Judge Smith to be considered under Section 7(3) of the FOI procedures, as would be the case with a body that is subject to the terms of the Act...."

13. In response to correspondence from the Department in relation to the first named notice party's request, Mr. Justice Smyth wrote on 5 July 2012 that the purpose of the transcript was to allow for a free flowing dialogue during his interviews, and that in his recollection, he "made it perfectly clear to each individual at the outset of our meeting that the transcript was exclusively for [his] use only and would not be made available to them or anyone else". He went on to state that:-

> "These documents are essentially my documents, not those of anyone else, which are on deposit for safekeeping in the Department. If a Court order for Discovery is made I will comply with it – having first explained to the Court the background and purpose of their existence. not otherwise. . ." [Emphasis in original]

14. The first named notice party then referred the matter to the Commissioner. A preliminary review of the application was communicated to the Department in November 2012. This was responded to by the Department in December 2012. Whilst reference was made in those exchanges to the views expressed to the Department by the Reviewer, the Department did not furnish to the Commissioner the correspondence between it and the Reviewer. This was, however, exhibited in the affidavits before the High Court and is the subject of one minor issue on this appeal.

15. The final decision taken on behalf of the Commissioner by a Senior Investigator was issued on 7 June 2013. The public body from which the record was sought is the Department. The review by the Commissioner was pursuant to s. 34(2) of the 1997 Act. The decision was to annul the Department's decision and direct the Department to deal with the first named notice party's request as made on 16 May 2012, subject only to the provisions of the 1997 Act.

16. A summary of the assessment of the Department's decision appears on p.4 where the Senior Investigator stated:-

> "Assessment of Department's position.
>
> As I have outlined above, while section 6(1) of the FOI Act confers a general right of access to records held by a public body, the word "held" is not defined in the FOI Act. According to the Oxford English Dictionary, the word "hold" means "The action or fact of having in charge, keeping, guarding, possessing, etc.; keeping, occupation, possession; defence, protection, rule". Having regard to the ordinary meaning of the word "hold", I find that the relevant records are held by the Department in this case because it has physical possession of the records in question. I would add that the FOI Act does not appear to be concerned with the question of whether or not a particular public body ought to be in possession of given records. It simply confers a right of access to a requester to records "held" by such a body. In any event, given their subject matter, it seems to me that it is entirely appropriate that the records are in the possession of the Department in this case." [emphasis added]

17. The Senior Investigator then noted that "arguably the issue of whether records can be deemed to be under the control of a public body should arise only where records are not physically held by the body. Nevertheless, for the avoidance of doubt, I have considered the Department's arguments that the records in question are not under its control". He then considered the arrangements, as explained to him, between the Minister, the Department and the Reviewer, and he further considered an argument which seeks to distinguish between the Minister and the Department and expressed the view that "for the purposes of the FOI Act, the Minister is deemed to be the head of the Department". At p. 7 of his decision, he summarised his view of the position on control:-

> "In summary, the position regarding control of records is, in my view, very clear. The review was commissioned by the head of the Department; the reviewer was, in essence, providing a service for or on behalf of the head; the reviewer was not acting on the basis of any legal powers either inherent in his status as a retired judge or inherent in the status of the review itself; once the reviewer had completed the review, and given the final report and related records to the Department, those records were then under the control of the Department. In any event, as I have indicated above, the records are in the possession of the Department. Accordingly, for the purposes of the FOI Act, I find as a matter of fact that the records in question are held by the Department."

Statutory Framework

18. The Freedom of Information Act 1997 as amended by the Freedom of Information (Amendment) Act 2003 ("the 2003 Act") is exclusively the relevant statutory framework. The long title sets out in some detail the purpose of the 1997 Act, as amended. It commences by stating:-

> "AN ACT TO ENABLE MEMBERS OF THE PUBLIC TO OBTAIN ACCESS, TO THE GREATEST EXTENT POSSIBLE CONSISTENT WITH THE PUBLIC INTEREST AND THE RIGHT TO PRIVACY, TO INFORMATION IN THE POSSESSION OF PUBLIC BODIES AND TO ENABLE PERSONS TO HAVE PERSONAL INFORMATION RELATING TO THEM IN THE POSSESSION OF SUCH BODIES CORRECTED AND, ACCORDINGLY, TO PROVIDE FOR A RIGHT OF ACCESS TO RECORDS HELD BY SUCH BODIES, FOR NECESSARY EXCEPTIONS TO THAT RIGHT ..."

19. The structure of the Act is relied upon by the Commissioner. In general, after initial provisions including definitions, he submits that Part II provides for the right of access to records in s. 6 and Part III provides for the circumstances in which a right of access either shall or may be refused. That clear distinction may not be justified, for

the reasons set out later in this judgment. Part IV of the 1997 Act established the office of the Information Commissioner and provided for reviews by the Commissioner and appeals to the High Court.

20. The 1997 Act includes in s. 2 a significant number of definitions. It defines a public body in accordance with the first schedule to the Act. The Department, but not the Minister, is included. Similarly, the "head of a public body" is defined and as held in the decision of the Commissioner in relation to a department it is the Minister having charge of it.

21. Section 2 also provides that the right of access is to be construed in accordance with section 6.

22. Section 6(1) provides:-

> "(1) Subject to the provisions of this Act, every person has a right to and shall, on request therefor, be offered access to any record held by a public body and the right so conferred is referred to in this Act as the right of access".

23. However, s. 6(7) provides:-

> "(7) Nothing in this section shall be construed as applying the right of access to an exempt record"

24. An "exempt record" is defined in s. 2 as meaning:-

> (a) a record in relation to which the grant of a request under section 7 would be refused pursuant to Part III or by virtue of section 46, or
>
> (b) a record that is created for or held by an office holder and relates to the functions or activities of—

(i) the office holder as a member of the Oireachtas or a political party, or

(ii) a political party;

25. "Held" is not defined for the purposes of the Act. However, s. 2(5)(a) provides that in this Act, "a reference to records held by a public body includes a reference to records under the control of the body". "Control" has no special definition for the purposes of the Act.

26. Section 6(9) deems certain documents to be held by a public body. It provides:-

> "(9) A record in the possession of a person who is or was providing a service for a public body under a contract for services shall, if and in so far as it relates to the service, be deemed for the purposes of this Act to be held by the body, and there shall be deemed to be included in the contract a provision that the person shall, if so requested by the body for the purposes of this Act, give the record to the body for retention by it for such period as is reasonable in the particular circumstances."

27. A person who wishes to exercise the right of access given by s. 6 must, under s. 7, make a request in writing to the head of the public body concerned for access to the record. The procedure to be followed thereafter is set out and there are provisions for refusal on administrative grounds and deferral none of which are relevant to the issues on this appeal.

28. In Part III, ss. 19-32 set out at number of circumstances in which access to a record held by a public body may or must be refused. Reliance in this appeal has been placed upon, *inter alia*, s. 22(1), s. 22(1A), as inserted by s. 17 of the 2003 Act,

and s. 26. It suffices to say that s. 22(1) provides for refusal of a request where the record concerned would be exempt from production in proceedings in a court on the ground of legal professional privilege or is such that a head knows or ought reasonably to have known that its disclosure would constitute contempt of court or consists of certain documents of members of European Parliament, local authority or health board or of the Houses of the Oireachtas or members thereof or committees thereof.

29. Section 22(1A) provides:

> "(1A)A head may refuse to grant a request under section 7 if the record concerned relates to the appointment or proposed appointment, or the business or proceedings, of—
>
> (a) a tribunal to which the Tribunals of Inquiry (Evidence) Act 1921 applies,
>
> (b) any other tribunal or other body or individual appointed by the Government or a Minister of the Government to inquire into specified matters at least one member, or the sole member, of which holds or has held judicial office or is a barrister or a solicitor, or
>
> (c) any tribunal or other body or individual appointed by either or both of the Houses of the Oireachtas to inquire into specified matters,
>
> and the request is made at a time when it is proposed to appoint the tribunal, body or individual or at a time when the performance of the functions of the tribunal, body or individual has not been completed."

30. It is to be noted in relation to the above section that it applies to an application made for access to a record held by a public body. The tribunals or other bodies or individuals appointed to inquire into matters are not themselves public bodies. The

potential exemption granted by s. 22(1A) relates to a department's own records concerning the tribunal or review. Whilst some reliance was placed by the Commissioner by analogy upon the express legislative exemption only for so long as the review or inquiry "has not been completed", it does not appear to be of relevance to the issues to be decided on this appeal.

31. Finally, the Commissioner relied upon the provisions of s. 26(1) as amended. in his submission that the decision of the High Court on the meaning of "held" for the purposes of s. 6(1) of the 1997 Act is incorrect. Section 26, as amended, provides:

> "26.—(1) Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if—
>
> *(a)* the record concerned contains information given to a public body in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body, or
>
> *(b)* disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in column (3) of the Third Schedule of an enactment specified in that Schedule) or otherwise by law.
>
> (2) Subsection (1) shall not apply to a record which is prepared by a head or any other person (being a director, or member of the staff of, a public body or a person who is providing a service for a public body

under a contract for services) in the course of the performance of his or her functions unless disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law and is owed to a person other than a public body or head or a director, or member of the staff of, a public body or a person who is providing or provided a service for a public body under a contract for services.

(3) Subject to section 29, subsection (1) (a) shall not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under section 7 concerned.

(4) Where —

(*a*) a request under section 7 relates to a record to which subsection (1) applies but to which subsections (2) and (3) do not apply or would not, if the record existed, apply, and

(*b*) in the opinion of the head concerned, the disclosure of the existence or non-existence of the record would have an effect specified in subsection (1),

he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists."

32. Whilst s. 26 is of relevance to the structure of the 1997 Act, it does not appear to relate to the record sought by the first named notice party as there is no contention that the information in the transcript was given to the Department in confidence. It was given to the Reviewer in confidence.

33. The Commissioner's power to review a decision such as that taken by the Department is set out in s. 34. In accordance with s. 34(2)(b), following the review, the Commissioner may affirm or vary the decision or annul the decision and if

appropriate, make such decision as he or she considers proper. Where a decision has been made by a public body to refuse to grant a request under s. 7, in accordance with s. 34(12)(b), it "shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified".

34. Finally, s. 42(1) provides for an appeal to the High Court on a point of law from a decision of the Commissioner by a party to a review under s. 34 or any other person affected by the decision.

Decision of the High Court

35. The appeal to the High Court is on originating notice of motion grounded on an affidavit. In addition to the first named notice party, the Reviewer was made a notice party but has not participated in the proceedings. The grounding affidavit sworn on behalf of the Minister exhibited relevant correspondence between the Department and the Reviewer both prior to and after the request for access by the first named notice party, some of which had not been furnished to the Commissioner. No objection was taken in the High Court to those documents being put in evidence before the High Court.

36. On the issue of the interpretation of the term "held" in s. 6(1) of the 1997 Act. the High Court judge, in the context of the submissions made, concluded at para. 41:-

> "41. I am satisfied that to hold that mere lawful possession of a document was sufficient to make that document amenable to disclosure under the 1997 Act, on the basis that the document was "*held*" by the public body within the meaning of s. 6(1) would give rise to absurd and wholly unintended consequences, albeit in rare

circumstances. In my opinion, for a document to be "*held*" within the meaning of s. 6(1) of the 1997 Act, it must be either lawfully created by the public body in question or lawfully provided to that public body or lawfully obtained by the public body, in connection with the functions or business of that public body and the document must not be subject to any prior legal prohibition affecting its disclosure. For example, the use of documents discovered in legal proceedings can only be used in those proceeding and for no other purpose. Thus, documents which came into the possession of a public body by way of discovery in legal proceeding, could not subsequently be released by the public body in response to a request under the 1997 Act, unless the party in the legal proceedings, who had discovered the document consented to the disclosure under the 1997 Act."

37. The trial judge considered the impact of Part III of the 1997 Act on the meaning he placed on the word "held" in s. 6(1) and, in particular, on his conclusion that it includes that the document must not be subject to any prior legal prohibition affecting its disclosure at para. 42, where he stated:-

"42. Part III of the 1997 Act containing ss. 19 to 32 inclusive, deals with exempt records. Whilst s. 32 creates an exemption from disclosure for certain records, the disclosure of which is prohibited by any enactment other than a provision specified in Column (3) of the Third Schedule to the Act, any legal prohibition on disclosure in private law, or generally, in common law, unless it falls within one of the exemptions set out in ss. 19 to 32, is not the subject of an exemption under Part III of the 1997 Act. The Act of 1997 does not make any express provision by way of a saver in respect of binding legal prohibition from disclosure, such as by expressly subjecting such legal prohibitions to the provisions of the Act in the future, and perhaps a saver for those existing on the coming into effect of the Act. In the absence of any provision in the Act in

this regard, and to ensure harmony between the Act and other co-existing binding legal prohibition on disclosure, not contemplated in the Act, it is necessary, in my opinion, to construe the term "held" in s. 6(1) in the manner set out above."

38. The trial judge then considered the nature of the relationship between the Reviewer and the Minister or the Department. This was in the context of the determination in the Commissioner's decision that the Reviewer was the provider of a service for the Minister or the Department within the meaning of s. 6(9) of the 1997 Act. Having done so, he concluded that the provision of the service provided by the Reviewer could not be considered as falling within the terms of s. 6(9), as it "would be wholly inconsistent with the independent nature of the functions discharged by [the Reviewer]".

39. O'Neill J. then considered the issue of ownership or control of the record to which the first notice party sought access. Having considered the evidence before him, including statements made by the Reviewer in the letter of 23 September 2010 already referred to and further statements in his letter of 5 July 2012 following the request by the first notice party for access to the transcript of his interview, the trial judge concluded at paras. 56 – 59:-

> "56. Adopting a broad, expansive approach to the nature of the document in issue in this case, the transcript of the interview with the first named notice party, there is no doubt but that the content of this document concerned or related to the business or functions of the Department of Health. However, as the Minister or the Department had no right of ownership or control over this document or record, the terms upon which it came into their possession by being placed with them by Mr. Justice Smyth are crucial as to whether or not it could be said that the document was

"held" by the Department within the meaning of s. 6(1) of the 1997 Act. It is quite clear from the letter of 23rd September 2010, that Mr. Justice Smyth did not transfer to the Department any proprietorial right or right of control over the document in issue in this case, nor did he give the Department any permission to disclose the document to anyone, the only circumstance in which he conceded disclosure was in the event of an order for discovery by a court.

57. As Mr. Justice Smyth was entitled to impose these terms and conditions, and as the Department accepted into their custody this document on those terms, unless Mr. Justice Smyth agrees otherwise, the Department is bound by those terms and lawfully prohibited from any disclosure, save as excepted by Mr. Justice Smyth.

58. Thus, as the Department has no control over these documents within the meaning of s. 2(5) of the Act of 1997, and as they are in their possession, subject to a legally enforceable prohibition on disclosure, notwithstanding the fact that they have physical possession of the document in question, it cannot be deemed to be "held" by the Department within the meaning of s. 6(1) of the 1997 Act.

59. Accordingly, I must respectfully disagree with the determination of the respondent in this matter and I will make the order sought at paragraph 1 of the notice of motion, namely, an order pursuant to s. 42(1) of the 1997 Act, setting aside the decision of the respondent dated 7th June 2013, and I will substitute for that decision my own decision that the record sought is not a record "held" by the appellant".

Issues and Submissions on Appeal

40. The primary issue on appeal is the correct interpretation of a "record held by a public body" for the purposes of s. 6(1) of the 1997 Act. As already indicated, this gives rise to difficult questions which have not previously been addressed by this Court. I wish to acknowledge the considerable assistance given to the Court by the careful and thorough submissions made by counsel for the Commissioner, counsel for the Minister and counsel for the first named notice party, both in the written and oral submissions made and their helpful consideration during the hearing of issues raised by the Court.

41. The starting point of the submissions made on the issue on behalf of the Commissioner was the correctness of the approach in the decision issued on his behalf in this application, namely that the documents are held by the Department for the purposes of s. 6(1), "because it has physical possession of the records in question". It was also submitted that even if that was not correct, that the High Court judge erred in importing into the question of whether a record was "held" for the purposes of s. 6(1) issues which concern the question of whether or not it was an "exempt record" such as to justify a refusal of access.

42. Similarly, the submissions made on behalf of the Minister took as their starting point the correctness of the interpretation of the trial judge, including a requirement that the record "must not be subject to any prior legal prohibition affecting its disclosure". It is not entirely clear whether the disclosure he was referring to was disclosure to a third party or disclosure to the Department itself.

43. However, in the course of oral submissions, counsel for each of these parties, in response to questioning from the Court, helpfully acknowledged potential

intermediate interpretations. On behalf of the Commissioner, it was recognised that applying the well-established principles in relation to statutory interpretation, which require the Court to consider the ordinary meaning of the words used by the Oireachtas, in the context of s. 6 and the entire statute and its purpose, it could not be interpreted as simply requiring physical possession of the document. It was acknowledged that such an interpretation could, as stated by the High Court judge, lead to absurd results not intended by the statute.

44. Similarly, on behalf of the Minister it was recognised that an interpretation which included a requirement that it not be subject to prior legal prohibition affecting its disclosure, if that meant disclosure to third parties, might not be consistent with the scheme of the Act, which provides for a broad right of access in s. 6 to records "held" by a public body (other than exempt records), having regard in particular to the potential exemptions provided for in ss. 22 and 26 of the 1997 Act, as amended.

45. Notwithstanding the above acknowledgements, there remained a significant dispute as to the meaning of "held" in s. 6(1) of the 1997 Act.

46. Counsel for the first notice party drew the Court's attention to two decisions from England: *Department of Health v. The Information Commissioner and Anor.* [2017] EWCA Civ. 374, [2017] 1 W.L.R. 3330, a judgment of Sir Terence Etherton M.R. in the Court of Appeal and a decision of the Upper Tribunal in *University of Newcastle upon Tyne v. Information Commissioner and BUAV* [2011] UKUT 185 (AAC). In doing so, he recognised the difference between the terms of s. 6(1) of the 1997 Act (taking into account ss. 2(5)(a) and 6(9)) and s. 3(2) of the UK Freedom of Information Act 2000, at issue in those judgments, which appears to expressly exclude information held on behalf of another person. It provides:

"(2) For the purposes of this Act, information is held by a public authority if –

(a) It is held by the authority, otherwise than on behalf of another person, or

(b) It is held by another person on behalf of the authority."

Discussion on "Held" in Section 6(1) of 1997 Act

47. The proper approach to the construction of the 1997 Act was considered by McKechnie J. in the High Court in *Deely v. Information Commissioner* [2001] 3 I.R. 439, at p. 451. There, he set out the well established approach, which is to identify the intention of the Oireachtas from the wording of the provision or provisions in question, as established in *Howard v. Commissioner of Public Works* [1994] 1 I.R. 101, and as he points out, in particular in the judgment of Blayney J. However, he also continues to state, and I respectfully agree, that a court is entitled "to look at the Act as a whole and if there is any doubt or ambiguity, the purpose, intention and objects of the Act may also be considered". He then states:-

"(c) I am not therefore certain that, given the vision of the Act of 1997, it is altogether a complete statement to suggest, that, the provisions thereof in their entirety can adequately be interpreted, for the purpose of implementation, simply by a straightforward application of *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101.

(d) In *Minister for Agriculture v. Information Commissioner* [2000] 1 I.R. 309, the High Court (O'Donovan J.) at p. 319 of the report, having quoted a passage from the judgment of Denham J. in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, immediately goes on to refer to the preamble of the Act and the

intention of the legislature, and does so, very much in a way which embraces both as being of considerable importance in indicating how one should construe, not only the section with which the learned trial judge was then specifically dealing, but also the entirety of the Act. Furthermore, at p. 312 he impresses the importance of this preamble and in addition having referred to s. 34(12)(b) and s. 8(4) emphasises the status of the rights conferred by this Act and so,

(e) I would simply caution as to how in a complete way this Act might be interpreted."

48. I respectfully agree with the above and in particular, the importance of the long title or preamble, as is referred to above, of the 1997 Act. It appears to me to be of assistance in interpreting the meaning of "held" for the purposes of s. 6(1) of the 1997 Act, insofar as it is relevant to the issues raised by this appeal.

49. I accept the import of the submission made on behalf of the Commissioner that s. 6(1) gives rise to two distinct questions for a decision-maker when access to a record alleged to be held by a public body is requested; first, whether it is a record "held" by the public body; and secondly, and separately, whether the applicant has a right of access to it. I also consider that the statutory criteria according to which each question is to be answered are distinct. It does appear to me, with respect, that the High Court judge may have failed to keep separate the two questions in the third part of his test for "held".

50. However, I am in agreement with the High Court judge that "held" for the purposes of s. 6(1) cannot simply mean lawful, physical possession of a record, as this would, as he states, "give rise to absurd and wholly unintended consequences". If such were the meaning, it could, for example, include records which were simply

personal documents of an employee of a public body containing information totally unrelated to his work which that employee keeps in a drawer in his desk.

51. The 1997 Act, unlike s. 3(2) of the UK Freedom of Information Act 2000, does not in substance expressly exclude information held by a public authority "on behalf of another person". As appears from the judgment of the English Court of Appeal in *Department of Health v. The Information Commissioner* already referred to, even in the context of such a statutory exclusion, the term is interpreted as meaning that "there must be an appropriate connection between the information and the Department so that it can properly be said that the information is held by the Department".

52. It is also relevant to note another difference between the 1997 Act and the then UK provision, in that s. 3(2) concerns "information" held, whereas s. 6(1) refers to "records" held. Notwithstanding that difference, to which I will return, it appears to me that the requirement that the record be lawfully in the possession of the Department in connection with or for the purpose of the business or functions of the Department similarly applies to s. 6(1) of the 1997 Act. This is consistent with the purpose of the Act as expressed in the long title.

53. In the course of oral submissions, the ultimate dispute between counsel for the Commissioner and first named notice party on the one hand and counsel for the Minister on the other was whether or not the word "held" in s. 6(1) imports some additional criteria over and above that the record is in the lawful possession of the Department in connection with or for the purpose of its business or functions. In particular, on the facts of this appeal it was disputed whether, as contended by the

Minister, the fact that the Department did not have access to or control over the record in question means that it was not held by the Department.

54. In the High Court, it is not clear whether the question of the right of access of the Department to the record sought, namely the transcript of the interview of the first named notice party with the Reviewer, was addressed. The question of the control of the record was addressed.

55. The issue which thus arises, and which I do not think has been previously addressed by this Court, is whether the meaning of "held" used in the phrase a "record held by a public body" in s. 6(1) of the 1997 Act means not only that the record is in the lawful possession of the public body in connection with or for the purpose of its business or functions, but also that the public body itself has a right of access to the record and its contents, i.e. the information it contains.

56. On the facts of this appeal, the Reviewer had sealed the box in which the transcript of the interview sought by the first named notice party had been placed. He had stipulated that the box could not be opened without a court order, of which notice was to be given to him. The decision of the Department following the internal review was in part based upon its view (upon advice) that it did not have access to the record sought.

57. My conclusion is that the meaning of "held" in the phrase "any record held by a public body" in s. 6(1), when interpreted in accordance with the ordinary meaning of the words used in the context of the purpose of the 1997 Act as set out in the long title, does require that the public body in question is entitled to access the record in question, in the sense of being entitled to access the information contained in the record, for the following reasons.

58. The purpose of the 1997 Act, as set out in the long title, is to "enable members of the public to obtain access, to the greatest extent possible… to information in the possession of public bodies and to enable persons to have personal information relating to them in the possession of such bodies corrected and, accordingly, to provide for a right of access to records held, for necessary exceptions to that right…".

59. As appears, the statutory purpose is to enable the public to have access to information in the possession of public bodies and it is for that purpose that a right of access to records held is given. A record is defined in s. 2 for the purposes of the Act and includes all physical or digital formats in which information is kept or stored. As the purpose of giving a right of access to a record is to access information held by a public body, it does not appear to me that a record can be considered to be held by a public body for the purposes of s. 6(1) unless the information in the record is also held by the public body. As already determined, this means that the public body is in lawful possession of the information in connection with or for the purpose of its business or functions. To be in possession of information in connection with or for the purpose of its business or functions requires, at a minimum, that the public body has access to the information in question.

60. Accordingly, I have concluded that for a record to be "held" within the meaning of s. 6(1), the public body must not only be in lawful possession of the record in connection with or for the purpose of its business or functions but also must be entitled to access to the information in the record.

61. I wish to emphasise that in the above, I am speaking of the right of access by the Department itself to the information in the record. I do not agree with the trial judge that a relevant criterion in deciding whether a record is "held" is whether or not

the record is subject to any prior legal prohibition affecting its disclosure, in the sense of disclosure to third parties, if that was intended. It appears to me from the example given by the trial judge of discovery, in para. 41 of his judgment, that it was so intended. The submission made by the Commissioner on this point appears to me to be correct. The questions of confidentiality to the Department or disclosure by the Department to third parties, including to a person who makes an information request under the 1997 Act, properly form part of the consideration of the separate and distinct questions of whether the record in question is or is not an exempt record, as defined, or whether there is a lawful basis for the Department to otherwise refuse access to the document under the 1997 Act, as amended.

62. I do not consider that s. 2(5)(a) of the 1997 Act, by providing that records held by a public body "includes a reference to records under the control of the public body", is in any way inconsistent with the above conclusion. Rather, it may support the conclusion, insofar as it imports into the concept of a record held by a public authority a record over which it has control but, as is implicit, one that is not in the lawful possession of the public authority. Control of a record, within the meaning of s. 2(5)(a) of the 1997 Act may also require that the person in control of the record be entitled to access the information contained in the record. In circumstances where the record sought was in the possession of the Department, I do not consider that it was necessary to address the question as to whether or not it was in the control of the Department.

63. The remaining statutory provision which requires consideration is s. 6(9) of the 1997 Act. That subsection deems a record "in the possession of a person who is or was providing a service for a public body under a contract for services... to be held

by the body". Whilst undoubtedly the decision of 7 June 2013 taken on behalf of the Commissioner addresses the question as to whether the Reviewer was or was not providing a service for the Department under a contract for services within the meaning of s. 6(9), it also, correctly in my view, states "arguably, the issue of whether records can be deemed to be under the control of a public body should arise only where records are not physically held by the body". This appears to me not just an arguable but a correct view of s. 6(9). It is directed to a situation where the records are not in the possession of the public body but instead remain in the possession of the service provider, and they are deemed to be held by the public body where the necessary criteria are met.

64. The High Court judge also addressed s. 6(9) and reached a conclusion on the evidence before him that the provision of the service by the Reviewer to the Minister could not be considered as falling within the terms of s. 6(9) as it would be "wholly inconsistent with the independent nature of the function discharged by [him]". As it is agreed that the record sought by the first named notice party is in the physical possession of the Department, I do not consider it necessary to consider the grounds of appeal against the finding made by the High Court judge on this issue. The decision of the Commissioner was not based upon s. 6(9). Nevertheless, I would agree with the view expressed by the High Court above.

65. The submissions on behalf of the Commissioner included that the High Court judge had failed to have sufficient or adequate regard to s. 34(12) of the 1997 Act. This relates to the review by the Commissioner of a decision to refuse to grant a request under s. 7. In accordance with s. 34(12)(b), such a decision "shall be

presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified".

66. The Commissioner in his submissions is correct that there is an onus on a head of department to satisfy the Commissioner that the decision to refuse was justified. In this instance, the decision was that the transcript requested was not a record held by the Department within the meaning of s. 6(1). This was sought to be justified, *inter alia*, by reason of the fact that the Department had been advised (and by implication accepted that advice) that "the records are not in the control of this Department and cannot be accessed or released by the Department under FOI legislation." The factual basis for that purported justification was the status of the Reviewer having conducted an independent review and the matters stipulated by him when furnishing sealed boxes of documents, which included the transcript sought by the first named notice party.

67. I do not consider that the trial judge's judgment in any way overlooked the obligations placed on a public body which makes a decision to refuse access to a record to justify that decision to the satisfaction of the Commissioner.

68. Finally, I think it appropriate to add that I do not agree with the general submission made on behalf of the Commissioner that the scheme of the 1997 Act is in Part II, to give a broad right of access to records held by a public body and in Part III, to provide for exemptions and a basis for refusal of that right of access. The reason I do not agree with this submission is based on s. 6(7), which expressly provides that nothing in s.6 "shall be construed as applying the right of access to an exempt record". Hence, Part II of the Act in s. 6 itself makes clear it does not grant a right of

access to an exempt record. In *Rotunda Hospital v Information Commissioner* [2013] 1 I.R. 1, Macken J, in this Court, having set out ss. 6(1) and 6(7), put it thus:-

> **"[209]** On the face of it, therefore, and in the clearest terms possible, there is simply no statutory "right of access" to any records covered by Part III of the Act. It must nevertheless be recognised, as it is in the Act, that tensions may, or will arise, between the generous right of access to information, provided by s. 6(1), and the equally important rights also properly protected by law, by the exemption from disclosure in Part III, and in consequence of the express recognition, in s. 6(7), that the right of access in s. 6(1) is not a right to an exempt record. The tension between these respective rights may have to be resolved. The manner in which it is resolved by the Oireachtas under the Act is through the mechanism of Part III. In Part III are recognised all the other rights, many of them private rights, and how these rights are to be dealt with, *inter alia*, in the event that a person makes a request for information, even though not having a "right of access" under s. 6(1)."

Application of above Principles to Decision of the Commissioner

69. As set out earlier in this judgment, the decision of the Commissioner was based upon the view expressed that as the record sought was in the physical possession of the Department, it was "held" by the Department for the purposes of s. 6(1) of the 1997 Act. For the reasons set out in this judgment, that decision contains an error of law, namely the true meaning of "held" for the purposes of s. 6(1) of the 1997 Act. Accordingly, I would uphold that part of the High Court decision which set aside the decision of the Commissioner issued on 7 June 2013.

70. As set out already, the High Court substituted in place of the decision of the Commissioner the decision that "the record sought is not a record "held" by the [Department]". Insofar as that decision of the High Court may have been based upon

a meaning of "held" which included a prohibition imposed by the Reviewer on disclosure by the Department to third parties, for the reasons already set out, I would not agree that such were appropriate considerations.

71. The issue which this Court has to consider, in application of the meaning of "held" for the purpose of s. 6(1) already set out, is whether the Department provided to the Commissioner justification for its decision that the transcript sought by the first named notice party was not held by the Department within the meaning of s. 6(1), such that as a matter of law, the Commissioner ought to have been objectively satisfied of such justification, in accordance with s. 34(2)(b).

72. The decision of 7 June 2013 sets out what the Department informed the Commissioner in relation to the question of its access to the transcript in question. At p. 4, the decision records:-

> "According to the Department, the Reviewer pointed out that the transcripts are his property which he has lodged with the Department for safekeeping and he recalls that he made it clear to everyone that the transcripts were for his exclusive use only and would not be made available to those who met with him or to anyone else."

73. The decision also records the stipulation included by the Reviewer in his letter of 23 September 2010, as set out at para. 10 of this judgment.

74. The decision of the Commissioner then states at para. 6:-

> "I note the Department does not consider it has the legal right to access the records at issue. While I am not aware of any express statutory entitlement of the Department to access the records, neither am I aware of any express statutory entitlement afforded to the Reviewer granting legal entitlement to withhold access to the records he gave to the

> Department. The terms of reference of the review did not expressly provide for such an entitlement. The Reviewer fulfilled the task assigned to him and reported to the Minister for Health; he created the back-up records to his report which he transmitted to the Department; the records were clearly in the Department's possession when the FOI request was made and remain so".

75. The Commissioner was, in my view, in error in simply considering the legal entitlement of the Department to access the transcript sought by the first named notice party by reference to the absence of a statutory entitlement given to the Reviewer to withhold access to the Department. The Reviewer was conducting a non-statutory review on this issue. I consider the High Court judge was correct in his analysis that the Reviewer was entitled to settle the terms upon which he would obtain cooperation from persons who contributed to the Review and was entitled to impose terms and conditions when sending the documents to the Department, and that the Department accepted them into their custody on those terms. This conclusion of the High Court was reached in accordance with the evidence of the communications between the Department and the Reviewer, of which the Commissioner was aware and which is recorded in the decision of the Department that these transcripts were created solely for the exclusive use of the Reviewer.

76. The question as to whether or not in 2013, the Department was entitled to access the transcripts furnished by the Reviewer in a sealed box is a question of law or a mixed question of law and fact. The information furnished by the Department to the Commissioner included the terms of reference and the content of the exchanges between the Department and the Reviewer, including the Reviewer's statement as to the basis upon which the transcripts came into existence and what he had told the individuals whose interviews they recorded. This evidence was such that it constituted

objective justification that the Department, in the absence of a court order, did not have a right to access the transcripts and the information contained within them, in accordance with s. 34(2)(b) of the 1997 Act.

77. In those circumstances, I consider that the High Court judge was correct in his ultimate decision that the record sought by the first named notice party was not a record "held" by the Department within the meaning of s. 6(1) of the 1997 Act. Accordingly, the appeal must be dismissed.